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Code of 1919.

What has become of the Code of 1919? If its provisions are to go into effect on January 1st, 1920, isn't it about time the Code should be distributed, in order to give a few months opportunity to study it?

Refusal of Writs of Error and Appeal.

The leading article in this number, by our distinguished friend, Mr. S. S. P. Patterson, will be read, we know, with much interest by Virginia lawyers, and whilst there is much force in a great deal of his argument, we must confess that we think the danger of injustice in the refusal of writs of errors and appeals is very small, if indeed there is any at all in the present practice of the courts. The invariable practice of our Court of Appeals is that when a petition is presented to one of the judges, if in his opinion the appeal or writ should not be granted, the record and petition is presented to each one of the other judges in turn, so that it runs the entire gamut of the court before a refusal takes place. We can hardly imagine a case in which all of the five judges have read a petition and record and refused a writ, in which argument would not be entirely useless, and it is always within the power of any suitor in the court, when all the judges have refused the writ, for a supplemental petition to be presented at the next term of the Court, when the entire Court confers together and renders its decision. We therefore cannot agree with our learned friend that there is the slightest chance of any injustice being done to any suitor in the court in regard to the present practice. We have always doubted, however, the wisdom of limiting in a writ of error or an appeal to the amount in controversy. It not infrequently

happens that some of the most important legal questions, which ought to be passed upon by the court of last resort, come up in a case far below the jurisdictional amount of the Court of Appeals. It seems to us that some provision ought to be made by which the judge in the lower court could certify to the Supreme Court questions which in his judgment should be passed upon by that Court independent of the amount involved, and that lawyers ought to be allowed to present a petition for a writ of error or appeal in any case in which they would be willing to certify that the point raised was of such novelty or interest as to require a decision from the highest court. Of course it is well known to the profession that some of the most important decisions of the English courts, even going up as high as the House of Lords, have been upon questions in cases where the amount involved was only a few shillings, and only in the last few days the Supreme Court of the United States has decided a case in which the amount involved was only eleven cents. The Supreme Court of the District of Columbia, on Dec. 9th, 1914, awarded to one J. Robert Sommerville damages for one day's discontinuance of his telephone service, amounting to eleven cents. On an appeal to the District Supreme Court that tribunal held that annoyance, inconvenience and loss of time as alleged in the declaration as elements of damage were not properly such elements. The Court of Appeals reversed this decision and the case was taken up to the Supreme Court of the United States by a writ of certiorari, which writ the Supreme Court of the United States denied, thus upholding the decision of the Court of Appeals of the District and establishing that annoyance, inconvenience and loss of time were elements of damage in a suit against a telephone company.

It is deeply to be regretted that in some way the question of profanity and bad temper and loss of time arising therefrom on account of telephone service could not have gotten before the court.

In the Halcyon days of the old county courts a young sprig of the law from Richmond came into the County Court of Louisa and so worried and bedevilled the venerable county commonwealth's attorney by his numerous "chinquapin pints" that

the old gentleman burst into violent and lurid profanity. With great dignity the presiding justice directed the clerk of the court to enter up a fine against the young Richmond lawyer for twenty-five dollars. The young man at once arose to his feet and said to the court that he was absolutely unable to understand why he should have been fined. "Sah," said the presiding justice, "We fine you for causing the commonwealth's attorney of this court to cuss. You had no business a-comin up here and get him mad and cause him to lose his temper and carry on in the way he has been carryin' on." The fine stuck. Could there not be some way in which the telephone companies could be reached for the profanity they cause their unfortunate customers to indulge in, though of course under the Virginia statute the cussing has to be done with the receiver up.

Softening the Rigor of the Forfeiture Laws.

There is often very much complaint by ill advised people on the subject of judge-made law, but we believe that in nine cases out of ten, if the cases decided are carefully scrutinized it will be found that the courts have merely construed the law so as to give it its proper effect, and very often moderate the rigor of a law by a construction which may not have been in the minds of the Legislature but which ought to have been. It is often said that the courts of equity moderated the rigors of the Common Law, and there is no more reason today why the court should not moderate the rigors of the statute law if they can do so by giving a proper construction to the act.

The Supreme Court of Kentucky, in the case of the Commonwealth against Mehler and Eckstenkemper Lumber Company, 208 S. W. page 13, has given an effect to a Kentucky forfeiture statute which might have been hardly contemplated by the draftsmen thereof but is certainly just and proper.

The Kentucky Statutes, Section 567, provide in almost the same language as the Constitution of Kentucky that no corporation shall hold or own any real property except such as may be necessary and proper for carrying on its legitimate business, for

a longer period than five years, under penalty of escheat. This is an action by the Commonwealth to forfeit certain land held by the defendant corporation for a period of more than five years without employing it in the corporate business. The statute relied on has been construed by the courts, not to work a forfeiture even though the land is held more than five years without actually being used in the corporate business where it is shown that the holding of land is in anticipation of its future use for corporate purposes accompanied by an ever present intention to devote it to such use. In this case, the testimony of the president of the corporation is held to be proper evidence that such an intention existed, and, though no resolution of the board of directors confirming such an intention is shown, it is held that there is sufficient evidence that such an intention existed and that therefore no forfeiture resulted.

Stockholders' Meetings —Necessity Therefor as a Condition Precedent to a Sale of Assets.

In the same way mentioned above the courts are most frequently disposed not to allow a technicality in corporation law to stand in the way of action which could not otherwise be complained of. Section 16 of the Stock Corporation law of the State of New York provides: "A stock corporation * * * with the consent of two-thirds of its stock may sell and convey its property, rights, privileges and franchises, or any interest therein or any part thereof, to a domestic corporation engaged in a business of the same general character. * * * Before such sale or conveyance shall be made such consent shall be obtained at a meeting of the stockholders called upon like notice as that required for an annual meeting. The Appellate Division, First Department of the State of New York *In re* Drosnes, 175 N. Y. Supp. 628 held that the requirement of a stockholders' meeting is a mere technicality and that such a sale may be made at a meeting of directors, if the directors voting for the proposition individually own two-thirds of the stock, and that the owners of two-thirds of the stock, without holding any

meeting, can consent to the sale in writing and that a dissenting stockholder can in such cases waive the meeting and elect to stand on the sale and thereby become entitled to the relief given by Section 17 of the Stock Corporation Law. Section 17 provides as follows: 'If any stockholder not voting in favor of such proposed sale or conveyance shall at such meeting, or within twenty days thereafter, object to such sale and demand payment for his stock, he may, within sixty days after such meeting, apply to the Supreme Court for the appointment of appraisers, etc.'" This last provision of the New York statute is in our opinion a most salutary one, and should be incorporated in our own Corporation Law.

Minority Stockholders — Compelling Directors to Declare Dividends—Right of a Corporation Organized for Business Purposes to Devote Any of Its Assets to Eleemosynary Purposes.

The name of Henry Ford has been very much before the public for a good many years. His celebrated car has encircled the earth in a much greater degree than the British drum beat ever did, and his unfortunate libel suit took up a vast deal more space of the newspapers than to which it really was entitled. In addition to these claims to notoriety Mr. Ford has given opportunity to the courts to pass upon some rather novel questions relating to corporations. In the case of Dodge, et al. *v.* Ford Motor Company, 170 N. W. 668, an important decision was rendered in regard to the action of directors as affecting the rights of minority stockholders to earned dividends. A statement of the entire case may not prove uninteresting.

The original articles of association of the Ford Motor Company were executed June 18, 1903. The capital stock was fixed at $150,000 with 1,500 shares of the par value of $100 each. The articles recited that the capital stock subscribed was $100,000, of which $49,000 was paid in cash, and $51,000 was paid for by letters patent issued and applied for, machinery, stock and contracts for supplies. The parties who signed the articles included Henry Ford, whose subscription was for 255

shares, John F. Dodge, Horace E. Dodge, Horace H. Rackham and James Couzens, who subscribed for 50 shares each, and several other persons. In 1908, the articles were amended and the capital stock increased from $150,000 to $2,000,000. In addition to a regular quarterly dividend equal to 5% monthly on the capital stock of $2,000,000, the board of directors declared and paid special dividends as follows: December 13, 1911, $1,000,000; May 15, 1912, $2,000,000; July 11, 1912, $2,000,000; June 16, 1913, $10,000,000; May 14, 1914, $2,000,000; June 12, 1914, $2,000,000; July 6, 1914, $2,000,000; July 23, 1914, $2,000,000; August 23, 1914, $3,000,000; May 28, 1915, $10,000,000; October 13, 1915, $5,000,000, a total of $41,000,000 in special dividends.

No special dividend having been paid after October 1915, the Dodge brothers who together owned 2,000 shares or one-tenth of the entire capital stock, in November 1916 filed in the Circuit Court for the County of Wayne, Michigan, a bill of complaint in which they charge that since 1914 they have not been represented on the board of directors of the Ford Motor Company, and that since that time the policies of the board have been dominated absolutely by Henry Ford.

It was alleged that on July 31, 1916, Henry Ford gave out for publication a statement of the financial condition of the company and declared it to be the settled policy of the company not to pay in the future any special dividends, but to put back into the business for the future all of the earnings of the company other than the regular dividend of 5% monthly upon the authorized capital of the company, namely, $2,000,000.

It was alleged that statements substantially in the following language, had appeared in the public press in the city of Detroit:

> "My ambition," declared Mr. Ford, "is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business."

It was charged that the invested assets of the company exclusive of cash on hand, as of July 31, 1916, represented more

than thirty times the present authorized capital of the company, and two and one-half times the maximum limit of $25,000,000 fixed by the laws of the State of Michigan, as the capitalization of such companies (this amount has since been increased to $50,000,000).

It was charged that the present investment in capital and assets constitute an unlawful investment and that the continued investment would be an unlawful policy.

The bill of complaint recited further that the plaintiffs had addressed complaint to the directors of the company in the form of letters but received nothing except a letter written by Mr. Ford's son Edsell, acknowledging receipt of one of the letters and that the same would be presented to the board of directors.

It was charged that Mr. Ford intended to invest millions of dollars of the company's money in the purchase of iron ore mines, the building of ships, the erection of a smelter and the construction and installation of steel manufacturing plants.

The plaintiffs asked for an injunction to restrain the carrying out of the alleged declared policy of Mr. Ford and for a decree requiring the distribution to stockholders of at least 75% of the accumulated cash surplus and for the future that the directors be required to distribute all of the earnings of the company, except such as may be reasonably required for emergency purposes.

The Supreme Court of the State of Michigan decided in favor of the plaintiffs in so far as special dividends are concerned. They sustained the decree of the court below fixing and determining a specific amount to be distributed to stockholders. This decree required that the directors of the Ford Motor Company declare a dividend upon all of the shares of stock in an amount equivalent to one-half of and payable out of the accumulated cash surplus of the company on hand at the close of the fiscal year ending July 31, 1916, less the aggregate amount of special dividends declared and paid after the filing of the bill of complaint, the amount to be declared being $19,275,385.96. The provisions of the decree in the court below against the using of any funds for a smelting plant or a blast furnace, against the increase of the fixed capital assets of the company, are reversed.

The Supreme Court cites the general authorities against the exercise of the right of judicial interference in the actions of corporate directors, but draws a distinction between an exercise of discretion on the part of directors in the declaration of dividends and an "arbitrary refusal" to do what the circumstances require to be done. The court says:

> "The record and especially the testimony of Mr. Ford convince us that he has to some extent the attitude towards shareholders of one who has dispensed and distributed to them large gains and that they should be content to take what he chooses to give. His testimony creates the impression also that he thinks the Ford Motor Company has made too much money, has had too large profits, and that although large profits might be still earned, a sharing of them with the public by reducing the price of the output of the company ought to be undertaken. We have no doubt that certain sentiments philanthropic and altruistic creditable to Mr. Ford, had large influence in determining the policy to be pursued by the Ford Motor Company. * * * There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public, and the duties which, in law, he and his co-directors owe to protesting minority stockholders. A business corporation is organized and carried on primarily for the benefit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in choice of means to attain that end and does not extend to a change in the end itself, to the reduction of profits or to the non-distribution of profits among the stockholders in order to devote them to other purposes."

The court concedes that a corporation has the power to make an incidental humanitarian expenditure of corporate funds for the benefit of its employees, like the building of a hospital and the employment of an agency for the betterment of their condition and appears to draw a distinction between this and the divergence of the entire corporate enterprise to the purpose of employing a large number of employees merely for their benefit as opposed to the financial interest of the stockholders.

In the case of Pardee *v.* Harwood Electric Co., 105 Atl. p. 48, the court has held:

"So far as not regulated by contract, the question of dividends on corporate stock is committed largely to the discretion of the directors; and while their action may be reviewed by the courts, it will be set aside only in case of bad faith, or when arbitrary, or manifestly erroneous, or such as to constitute an abuse of discretion or disregard of official duty."

We think that there can be very little doubt that the action of the Ford Directors was certainly arbitrary and erroneous and that therefore the decision of the court was manifestly correct.

Doing Business.

Probably no question has given the courts more trouble of late years than the one to decide when a foreign corporation was doing business in a state. A reference to a few of the cases might not prove uninteresting. In re Springfield Realty Co., 257 Fed. 785, it was held that installing Automatic Fire Sprinklers constituted doing business, by a foreign corporation although the contract contained no provision as to where materials or labor should be procured.

The Federal Court for the Eastern District of Michigan says the question whether a particular contract is interstate or intrastate in character, must be determined by a construction of the contract, rather than by a consideration of the manner in which it has been performed by the parties thereto. "It must be borne in mind that the contract in question does not provide for the sale of an article in interstate commerce under an agreement containing a clause to the effect that the seller shall install the article in the state to which it is sent. This contract provides merely for the furnishing and installation of certain apparatus in a certain building in the state of Michigan, without any provision for the prior transportation of such apparatus from outside into this State. Therefore the cases are not here applicable which distinguish between intrastate transactions and interstate commerce in contracts providing, not only for the sale and installation of articles, but also for the transportation of such articles from one state to another."

In New York in the case of Rosenblatt *v.* Bridgeport Metal

Goods Mfg. Co., 105 N. Y. 921, the Supreme Court, Kings County, special term, held that a foreign corporation is not "doing business" in the state, when it merely appears that the name of the corporation is upon the door of an office in New York City and was listed in a telephone directory and in a local trade directory. And the courts hold—as is to be expected—that where the subject matter of the contract was interstate commerce no license can be required. In Erie Beach, etc., Co. *v.* Spirella Co., Inc., 173 N. Y. Supp. 626, 105 N. Y. Misc. 170, the plaintiff, a Canadian corporation which had not procured a license to do business in New York, consummated the contracts with the defendant within the State of New York.

The court stated the facts as follows:

> "The plaintiff, at the time of the making of these contracts and for some time prior thereto, had an office in the city of Buffalo, N. Y., furnished, and with two stenographers, and the only evidence as to the business transacted thereat is the making of the first contract and two letters of plaintiff on its printed Buffalo letterhead, and I find that the business transacted at such office was in reference to the transportation of passengers between New York State and Erie Beach, Canada, and matters incidental thereto.
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> * * * It is claimed that the business conducted in the instant case was domestic and local, and not foreign, because the contract was actually made in New York, while the Tone Case [International Text Book Co. *v.* Tone, 220 N. Y. 316, 115 N. E. 914] the business transacted was the taking of orders which did not ripen into contracts until accepted in the home state of the corporation. Such was the situation in the Tone Case, and likewise in many cases in the United States Supreme Court; but here the contract was not for the sale of goods which might have to be brought into New York as an incident of its performance, nor even a contract, the performance of which required that something be brought into this state from another state or a foreign country. The contract here relates solely to transportation of passengers in foreign commerce and is analogous to the contracts made in Kentucky for the transportation of goods by an express company from that state to other states and which was held to be interstate commerce in Crutcher *v.* Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649.

> The plaintiff had a perfect legal right to enter the state of New York and do business in foreign commerce, and to maintain an office for the transaction of such business; it is here on such a mission, and the Constitution of the United States protects it in the exercise of such right."

A distinction was attempted to be drawn between the qualification by a foreign corporation in order to carry on its business in the state and compliance with the so called Blue Sky laws in order to secure permission to sell its stock or securities in the state. In the case of Edwards *v.* Ioor, 172 N. W. 620, the court made the following statement:

> "Compliance with the Corporation Act permits a foreign corporation to 'carry on its business,' the business for which it is organized in the state; compliance with the Commission Act permits it to sell its stock and other securities. One is not in any way dependent upon the other. One foreign corporation may desire to carry on its business in the state, but may not desire to sell stock; another may desire to sell stock, but may not desire to carry on its business in the state. If a foreign corporation desires to carry on its business and also sell its stock in the state it is obvious that it must comply with both acts. It is equally obvious that if it desires to do but one of these things, it is required to comply only with the provisions of the appropriate act."

In Missouri it has been held—Republic Rubber Co. *v.* Adams, 213 S. W. 80, that the forfeiture of the right of a corporation to sue or defend because of failure to qualify in that state did not apply to any suit or action except as to one pertaining to business done in Missouri.

The right of a non-par value stock corporation to qualify in a state was questioned in Kansas, but in the North American Petroleum Company *v.* Richard J. Hopkins, Attorney General, 181 Pac. 625, the Supreme Court of Kansas issued a writ of mandamus to compel the Charter Board—a branch of the Government of that state charged with the duty of issuing and regulating charters—to make inquiry concerning a Delaware corporation which had made application for authority to do business in the state in usual form with the exception that its certificate of incorporation provided for non-par value stock. The opinion

of the court is of much value in view of the perplexities presented by non-par value shares in the various states of the Union. Of course the main question was the amount of fees to be fixed.

The charter board of Kansas contended that because the shares of the North American Petroleum Company have no fixed or nominal par value, it would be difficult for the state officials to determine the amount of annual fees that the corporation should pay and that there is no means of knowing what its capital stock is without an examination of its assets. With respect to this contention the court says:

> "The problem of determining the solvency and *bona fide* capitalization of the plaintiff presents no unusual difficulty. The fact that the shares of its stock have no nominal par value is of little consequence. Any prudent charter board, in determining whether a foreign corporation is worthy of admission to do business in Kansas, would attach little importance to the nominal value of its shares of stock even if they have a nominal value. As in all other cases, the charter board should concern itself earnestly to ascertain the genuine capital—those assets permanently devoted to the corporate business as a basis for its business credit, and upon which its hope of profits is rationally founded. The 'Lawfully issued capital' and the 'capital stock' of such corporations are the assets that it devotes to the prosecution of its business. When the value of those assets is ascertained, the fee, required to be paid by law, can be based on that portion of the assets which the corporation proposes to 'invest and use in the exercise and enjoyment of its corporate privileges within the state.' The defendants contend that the plaintiff is not such an organization as is called a corporation in the constitution and laws of this state. This contention is based on the same facts as are the other contentions just disposed of. The answer to this contention is that corporations without capital stock and without shares of stock are not new; they are as old as corporations themselves, and have existed in England and in this country for many years; our constitution recognizes them, and we have laws for their control and government. The plaintiff can be admitted to do business in this state; and the defendants cannot refuse to make the inquiry concerning it directed by section 2136 of the General Statutes of 1915."